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HAROLD B. WILLEY,

In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. 931

THE BALTIMORE AND OHIO RAILROAD COMPANY,
a Maryland corporation,
Petitioner,

vs.

HON. JAMES C. CONNELL,
Judge of the United States District Court for the Northern District of Ohio, Eastern Division,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit.

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HON. JAMES C. CONNELL,
Judge of the United States District Court for the
Northern District of Ohio, Eastern Division,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled cause on February 13, 1956.

OPINIONS BELOW.

No oral or written opinions were handed down by respondent district judge or by the court of appeals.

JURISDICTION.

The judgment of the court of appeals was entered on February 13, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

The following questions are presented by this case:

1. Whether it was within the power of the court of appeals under the so-called "all writs" section of the Judicial Code (28 U. S. C. § 1651(a)) to review by way of petition for writ of mandamus the denial by respondent district judge of Petitioner's motions under § 1404(a) of the Judicial Code (28 U. S. C. § 1404(a)) to transfer an action for personal injuries and wrongful death entitled *Guy S. Jones v. The Baltimore and Ohio Railroad Company* from the District Court for the Northern District of Ohio, Eastern Division, to the District Court for the Northern District of West Virginia.

2. Whether, assuming the existence of such power of review, the rulings of respondent district judge with respect to the weight of the evidence adduced upon such motions were conclusive and not subject to review by the court of appeals.

3. Whether it was within the lawful discretion of respondent district judge under Sec. 1404(a) to deny Petitioner's motion to transfer said action when it had been made to appear without contradiction that the convenience of both parties and of all factual and four medical witnesses would be served by such transfer, and the only fact claimed to justify denial thereof was that shortly prior to the filing of the complaint plaintiff had "had medical examinations and x-rays" in Cleveland, Ohio, where suit was filed, at the hands of physicians of undisclosed name and number, the nature and relevancy of whose testimony was not suggested.

STATUTES INVOLVED.

The statutes involved are Sections 1404(a) and 1651 (a) of the Judicial Code, which provide as follows:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." (28 U. S. C. § 1404(a).)
>
> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." (28 U. S. C. § 1651(a).)

STATEMENT OF THE CASE.

On April 5, 1955, one Guy S. Jones, a resident of Little Falls, West Virginia, filed in the United States District Court for the Northern District of Ohio, Eastern Division, an action under the Federal Employers' Liability Act, 45 U. S. C. §§ 51-60, inclusive, seeking to recover from Petitioner for personal injuries allegedly sustained on August 6, 1952, while plaintiff was engaged as a section foreman in track maintenance operations near Morgantown, West Virginia. (R. 26-30.) Petitioner thereupon seasonably filed its motion under § 1404(a) of the Judicial Code seeking transfer of the action to the Northern District of West Virginia, upon the grounds that such transfer would serve the convenience of the parties and witnesses and the interest of justice. (R. 31.) Such motion was originally submitted for decision upon a record consisting of the complaint, two briefs filed by Petitioner in support of the motion, and one brief filed by plaintiff in opposition thereto. Upon such record it was uncontradicted that (1) plaintiff Jones was a resident of Little Falls, West Virginia, a town within twenty miles of one

of the places in which the District Court for the Northern District of West Virginia sits (R. 26, 32); (2) the accident resulting in the alleged injuries occurred in the vicinity of Morgantown, West Virginia, within the Northern District of West Virginia (R. 27, 38); (3) nine of plaintiff's fellow-employees, all residing in the vicinity of Morgantown, West Virginia, had witnessed the accident in which plaintiff was injured (R. 39); (4) four physicians resident and practicing in Morgantown, West Virginia, had treated plaintiff's injuries (R. 39); (5) trial of the action in West Virginia could be had within a few months, whereas trial in Cleveland would be delayed for a long period by the crowded condition of the docket (R. 32, 40); and (6) the residence of plaintiff, the residences of all factual and of the four West Virginia medical witnesses, and the place of the accident were all approximately two hundred miles from Cleveland, Ohio, and well outside the 100-mile subpoena range of the district court there. (R. 32, 36, 38.)

In the brief filed by plaintiff in opposition to Petitioner's motion to transfer, the only fact claimed to require trial of his action in Cleveland, Ohio, was that shortly prior to the filing of the complaint plaintiff "had medical examinations and x-rays" in the city of Cleveland (R. 36) by physicians of undisclosed name and number, the nature, relevancy, and importance of whose examinations was likewise not disclosed.

On June 3, 1955, without written opinion, respondent entered an order denying Petitioner's motion to transfer. The text of such order, in its entirety, is as follows:

> "Upon consideration, it is ordered that defendant's motion to transfer this case to the United States District Court for the Northern District of West Virginia is hereby overruled." (R. 43.)

On June 16, 1955, the death of Guy S. Jones was suggested, and an order of the Court reviving the action in the name of Maxine M. Jones, his administratrix, was entered on August 22, 1955. Thereafter, on September 2, 1955, Petitioner renewed its motion for transfer by the filing of a petition for rehearing thereof, in the light of the death of Guy S. Jones. (R. 44.) Petitioner attached to its petition for rehearing an affidavit of counsel setting forth in greater detail the grounds of the motion, including (1) the names and residence addresses of the nine factual and four medical witnesses residing in the vicinity of the place at which the action would be tried if transferred to the Northern District of West Virginia (R. 47); (2) comparative anticipated trial dates in the latter district and in the District Court for the Northern District of Ohio, Eastern Division, respectively (R. 48); (3) comparative distances between plaintiff's place of residence and the point of the accident on the one hand and the points of trial in the Northern District of West Virginia and the Northern District of Ohio, Eastern Division, on the other hand, with anticipated resulting differences in costs of trial in the respective jurisdictions (R. 46, 48); (4) the fact that important factual and medical witnesses would not be subject to subpoena if the action were tried in the Northern District of Ohio, Eastern Division; and like considerations demonstrating the need for transfer of the action. (R. 46-49.)

In order to elicit the factual basis for plaintiff's assertion that decedent had been examined at Cleveland, Ohio, prior to his death, Petitioner attached to its motion for rehearing interrogatories addressed to the plaintiff inquiring as to the names of the physicians concerned and the nature and dates of their treatments, if any. (R. 63-64.)

The petition for rehearing of the motion to transfer was opposed by plaintiff upon the sole ground that the

question had already been decided and that Petitioner for procedural reasons alone was not entitled to a rehearing thereof. (R. 65-73.) In opposing the rehearing plaintiff suggested no new or different factual considerations favoring a trial at Cleveland.

On December 22, 1955, again without written opinion, respondent district judge denied the petition for rehearing of the motion to transfer. The portion of respondent's order relating to transfer is as follows:

> "Upon consideration, it is ordered that defendant's petition for rehearing on the motion to transfer is hereby denied." [1] (R. 76.)

On February 6, 1956, Petitioner filed in the United States Court of Appeals for the Sixth Circuit, an application for leave to file a petition for writ of mnadamus. (R. i.) Petitioner attached to such application its petition for writ of mandamus under 28 U. S. C. § 1651(a), in which it was alleged that respondent's orders of June 3 and December 22, 1955, constituted an abuse of the discretion reposed in him by the provisions of § 1404(a) of the Judicial Code. (R. 1-6.) The entire record upon which the motion to transfer and petition for rehearing thereof had been submitted for respondent's decision was attached and made a part of Petitioner's mandamus petition. (R. 26-76.)

On February 13, 1956, the Court of Appeals, without argument or written opinion, caused to be entered an order reading:

> "The petition for a writ of mandamus is denied." (R. 77.)

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[1] At the same time, respondent granted a motion theretofore made by plaintiff to strike the interrogatories which would have elicited the identities of, and the dates and nature of examinations by, the physicians who were said to have examined decedent at Cleveland, and whose convenience was the only factual consideration claimed to justify a trial at Cleveland. (R. 76; Appendix A, *infra.*)

REASONS FOR GRANTING THE WRIT.

A. THE DECISIONS OF THE COURTS OF APPEALS ARE IN CONFLICT AS TO THE EXTENT TO WHICH MANDAMUS IS AVAILABLE TO REVIEW DISTRICT COURT RULINGS UPON MOTIONS TO TRANSFER.

Although the court below filed no opinion in this case, the language of its order makes clear that, consistent with its prior practice in cases of this kind, Petitioner's application for leave to file a petition in mandamus (R. i) was granted, that jurisdiction of the cause was assumed, and that the petition for writ of mandamus was denied upon its merits. (R. 77.)

The court's policy of granting free review by way of mandamus in cases of this character is illustrated by its decision in *Nicol v. Koscinski,* 188 F. (2d) 537 (C. A. 6th, 1951), in which the district court had ordered the transfer of a personal injury action to another district. The majority opinion, written by Judge Simons, stated that the court had power to grant mandamus if the district judge had abused his discretion but held that the facts of the case were such that no abuse was shown. In a dissenting opinion, Judge Allen, apparently agreeing that the court was empowered to issue a writ of mandamus, argued that the district court's transfer order did amount to an abuse of discretion and that the writ should have issued. Chief Judge Hicks, in an opinion concurring in the denial of the writ, held that the court was without power to review the action of the district court, on the ground that mandamus was appropriate only to compel the lower court to act, and not to act in any particular manner.

Consistent with the majority view in the *Nicol* case, the court has more recently assumed jurisdiction of two cases in which it was sought to review the transfer of two Federal Employers' Liability Act suits to other districts or

divisions. In both cases, the court held that no abuse of discretion was shown. *Fannin v. Jones, Chief Judge*, 229 F. (2d) 368 (C. A. 6th, 1956) (transfer from the Eastern to the Western Division of the Northern District of Ohio sustained), petition for certiorari filed April 6, 1956; *Berkihiser v. Jones, Chief Judge*, C. A. 6th, No. 12777, decided January 13, 1956 (transfer to another district and circuit sustained), petition for certiorari filed April 6, 1956.

Before discussing the areas in which the present case and the above decisions are in conflict with the views of the other appellate courts, it should be noted that the courts of all circuits are in accord that an order granting or denying transfer is not appealable.[2] There is also apparent unanimity that the courts of appeal may review by way of mandamus questions of law arising on motions to transfer, as, for example, matters relating to the correct interpretation of the language of § 1404(a).[3]

Apart from these areas of agreement, there is a wide range of opinion among the courts for the various circuits as to whether, and, if so, to what extent, they possess the

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[2] *In the Matter of Josephson*, 218 F. (2d) 174 (C. A. 1st, 1954); *Chicago, R. I. & Pac. R. R. v. Igoe*, 212 F. (2d) 378 (C. A. 7th, 1954); *Carr v. Donohoe*, 201 F. (2d) 426 (C. A. 8th, 1953); *Crummer Co. v. DuPont*, 196 F. (2d) 468 (C. A. 5th), cert. den. 344 U. S. 856 (1952); *Wiren v. Laws*, 194 F. (2d) 873 (C. A. D. C., 1951); *Nicol v. Koscinski*, 188 F. (2d) 537 (C. A. 6th, 1951); *Clinton Foods, Inc. v. United States*, 188 F. (2d) 289 (C. A. 4th), cert. den. 342 U. S. 825 (1951); *Paramount Pictures, Inc. v. Rodney*, 186 F. (2d) 111 (C. A. 3d), cert. den. 340 U. S. 953 (1951); *Shapiro v. Bonanza Hotel Co.*, 185 F. (2d) 777 (C. A. 9th, 1950); *Ford Motor Co. v. Ryan*, 182 F. (2d) 329 (C. A. 2d), cert. den. 340 U. S. 851 (1950); *Magnetic Engineering & Mfg. Co. v. Dings Mfg. Co.*, 178 F. (2d) 866 (C. A. 2d, 1950); *Jiffy Lubricator Co. v. Stewart-Warner Corp.*, 177 F. (2d) 360 (C. A. 4th, 1949), cert. den. 338 U. S. 947 (1950).

[3] See, e.g., *Chicago, R. I. & P. R. Co. v. Igoe*, 212 F. (2d) 378 (C. A. 7th, 1954); *Atlantic Coast Line R. Co. v. Davis*, 185 F. (2d) 766 (C. A. 5th, 1950).

power to review the exercise of a district court's discretion. The position of the court below conflicts with the rules presently followed by several of the other appellate courts, which are, moreover, in conflict with one another.

This Court did not resolve these conflicts in its recent opinion in *Norwood v. Kirkpatrick*, 349 U. S. 29 (1955), in which it expressly declined to rule on the availability and scope of mandamus to review transfer cases. (*Id.* 33.)

1. Conflict as to the Existence of Mandamus Jurisdiction.

(a) *Conflicts Depending Upon Whether the District Court Granted or Denied Transfer.*

In *In the Matter of Josephson*, 218 F. (2d) 174, 181 (C. A. 1st, 1954) the First Circuit Court of Appeals adopted the view that it does not possess the power to review by mandamus a district court's denial of transfer. The court's conclusion is based upon an analysis of the language and history of the so-called "all writs" section of the Judicial Code, 28 U. S. C. § 1651(a), which authorizes the issuance of writs "in aid of" appellate jurisdiction. The court reasoned that since denial of transfer results in retention of the case within the First Circuit, its potential appellate jurisdiction is fully preserved, so that mandamus can never lie. But where a district court has *granted* a motion for transfer to another district and circuit, the court for the First Circuit believes itself to possess mandamus jurisdiction, because such transfer operates to frustrate its potential appellate jurisdiction.

In the Eighth Circuit the reasoning of the court in the *Josephson* case, *supra*, has been extended to cases involving motions to transfer to another district or division of the same circuit. In *Carr v. Donahoe*, 201 F. (2d) 426 (C. A. 8th, 1953), the court held that it was without power to

review an order granting an intra-circuit transfer (even though a pure question of statutory interpretation was presented) on the ground that such transfer could not in any way impair or defeat the appellate court's actual or potential jurisdiction. This question was one which was expressly reserved by the First Circuit in the *Josephson* decision. See 218 F. (2d) at 181n.

The Second Circuit has not only squarely rejected the distinction adopted in the foregoing cases but has seemingly adopted a diametrically opposite view. In that court it has been held that while writs of prohibition and mandamus may issue under § 1651(a) to compel an inferior court to transfer, they do not lie to review transfers improvidently granted. *Torres v. Walsh*, 221 F. (2d) 319, 321 (C. A. 2d, 1955). Judge Medina's opinion in that case approves the earlier statement of Chief Judge Learned Hand in *Magnetic Engineering & Mfg. Co. v. Dings Mfg. Co.*, 178 F. (2d) 866 (C. A. 2d, 1950):

> "We do not believe that our power to protect our own jurisdiction extends to protecting it as against the jurisdiction of another federal court of equal jurisdiction * * *." (*Id.* at 869.)

Consequently, the Second Circuit in the *Magnetic Engineering* and later cases has held that, except in "really extraordinary" causes, mandamus will not issue where the district court has *granted* transfer, upon the ground that the power of review should be exercised, if at all, by the court of appeals of the transferee circuit.[4]

The rule adopted in the Second Circuit is thus squarely in conflict with the procedure followed in the First and

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[4] *Ford Motor Co. v. Ryan*, 182 F. (2d) 329 (C. A. 2d), cert. den. 340 U. S. 851 (1950); *Arrowhead Co. v. The Aimee Lykes*, 193 F. (2d) 83, 84 (C. A. 2d, 1951); *Anthony v. Kaufman*, 193 F. (2d) 85, 86 (C. A. 2d), 1951, cert. den. 342 U. S. 955 (1952).

Eighth Circuits. What is perhaps more important for the purposes of the present case, *both* rules are in conflict with the practice followed in the court below and in other courts of appeals, where, as will shortly appear, mandamus is granted or refused without reference to whether the district court granted or denied transfer. (See pp. 11-13, *infra*.)

(b) *Conflicts as to the Extent to Which the Courts of Appeals Should Consider Evidence as to "Convenience" and "Justice."*

Apart from the disagreement among the courts of appeals on the question of their *power* to review transfer orders in mandamus proceedings under § 1651(a), there is a further and equally urgent conflict as to whether it is proper, at the appellate level, to re-weigh the evidence adduced before the district court on the issues made under § 1404(a), that is, "the convenience of the parties and witnesses" and "the interest of justice."

Typical of the cases announcing the more restrictive view is the Third Circuit's decision in *All States Freight v. Modarelli*, 196 F. (2d) 1010, 1012 (C. A. 3d, 1952), in which that court determined that it should not grant review by way of mandamus where the district Judge "has considered the interests stipulated in the statute and decided thereon."

The identical rule is followed in the Court of Appeals for the District of Columbia, which will not review a transfer ruling if the district judge says he has considered the relevant criteria of the statute. *Loew's, Inc. v. McGuire*, 205 F. (2d) 719 (C. A. D. C., 1953). This is apparently true even though there was an abuse of discretion in the relative emphasis of those criteria:

> "The present petition asks that respondent be directed to consider the convenience of the parties and witnesses in the interest of justice. He says he has done so. *We take this to be conclusive.*" (*Id.* at 719-20; emphasis supplied.)

Somewhat similar to the refusal of the Third and District of Columbia Circuits *ever* to examine the evidence relied upon by a district Judge in transfer cases is the position taken by the First and Second Circuits in the cases in which those courts conceive themselves respectively empowered in the first instance to entertain mandamus petitions. (See pp. 9-10, *supra.*) Thus, in *In the Matter of Josephson*, 218 F. (2d) 174 (C. A. 1st, 1954), the Court, after quoting from the *Modarelli* case, *supra*, p. 11, said:

> "Accordingly we serve notice that in the future except in really extraordinary situations the nature of which we shall not undertake to formulate in advance, we shall stop such mandamus proceedings [to review transfers] at the very threshold by denying leave to file the petition for a writ of mandamus." (*Id.* at 183.)

The Second Circuit holds a like view, allowing the writ of mandamus only in "really extraordinary causes," as opposed to the "ordinary run-of-the-mill type of litigation which goes through the District Courts from day to day." *Torres v. Walsh*, 221 F. (2d) 319, 322 (C. A. 2d, 1955).

Near the center of the spectrum of judicial opinion is the position taken by the Fifth Circuit in *Atlantic Coast Line R. Co. v. Davis*, 185 F. (2d) 766 (C. A. 5th, 1950). There, the case had been transferred from New York to the Southern District of Florida. After two mistrials, the trial judge granted plaintiff's motion for transfer back to New York. The Fifth Circuit Court of Appeals granted mandamus to prevent the re-transfer upon the ground that

"there was * * * misconception of the *permissible weight* to be given the fact of mistrials." (*Id.* at 770; emphasis supplied.)

In vivid contrast to the view that mandamus may not issue even where the trial judge has committed an abuse of discretion is the attitude of the Court of Appeals for the Seventh Circuit. In *Chicago, R. I. & P. R. Co. v. Igoe,* 220 F. (2d) 299 (C. A. 7th, 1955), cert. den. 350 U. S. 822 (1955) (*infra,* p. 17), which was heard by the court *en banc,* a mandamus petition was filed by the railroad company to compel a district judge to transfer a wrongful death action from the Northern District of Illinois to Iowa. The railroad contended that the transfer was made mandatory by the evidence presented to the district judge with respect to the convenience of the parties and witnesses and the interest of justice. The court of appeals held, in effect, that it not only had mandamus jurisdiction to compel the district court in the first instance to apply the proper statutory tests but could thereafter require the lower court to exercise the discretion given by the statute within "permissible limitations." (*Id.* at 302.) Accordingly, the court reviewed at length the evidence bearing upon the issues of convenience and justice, and concluded, one judge dissenting, that the denial of the motion to transfer was "so clearly erroneous that it amounted to an abuse of discretion," and that mandamus should therefore issue to compel the transfer. (*Id.* at 305.)

The foregoing discussion gives some indication of the depth and scope of the diversity of appellate opinion on two questions: (1) Whether the courts of appeal have the *power* to grant mandamus in transfer cases; and (2) whether it is proper for them to *exercise* that power to

correct abuses of discretion by the lower courts in weighing the evidence.

The present case comes to this Court from a Circuit which answers the first question with a clear affirmative, and which apparently, in a proper case, would answer the second affirmatively as well, although Petitioner is unaware of any unreported decision in which it has done so. However, the glaring conflicts between the courts on these questions are nonetheless pertinent in determining whether certiorari should be granted in the present case. As this Court has frequently held, respondent has the right to urge the court to sustain the judgment upon all available grounds, including contentions not passed upon, and even rejected by the court below. See, e. g., *Lagnes v. Green*, 282 U. S. 531, 535-539 (1931); *Walling v. General Industries Co.*, 330 U. S. 545, 547 (1947).

B. THE RULINGS OF THE COURTS BELOW CONFLICT WITH DECISIONS OF THIS COURT AND OF THE SEVENTH CIRCUIT.

1. The Courts Below Disregarded Petitioner's Showing That the Balance of Convenience Overwhelmingly Favored Transfer.

Petitioner has no wish to argue the merits of the present petition at this time. However, the fact that neither court below saw fit to state the grounds for its denial of transfer makes a brief discussion of the evidence in support thereof essential to a full understanding of the areas of conflict between the rulings below and the applicable decisions of this Court.

As will be seen from the "Statement of the Case" (*supra*, pp. 4, 6), it was uncontradicted upon the record

made before the district judge that the convenience of both parties, and of all factual and four[5] expert medical witnesses, would be better served by trial in the Northern District of West Virginia. The *only* persons whose convenience could conceivably be served by a trial at Cleveland were certain unidentified physicians or radiologists who were said to be residents of Cleveland. Plaintiff's only reference to them is contained in a single sentence of one of the briefs filed in the district court:

> "* * * Because of the seriousness of the injury, this man was required to undergo a good part of his medical and operative procedures in New York City, *and also has had medical examinations and x-rays in Cleveland.*" (R. 36; emphasis supplied.)

The names of the doctor or doctors involved were never given; the nature, dates, and purpose of their examinations were not described; and it was not suggested that plaintiff received any treatment at their hands. That these doctors examined only for the purpose of testifying was the only logical inference. However, when Petitioner's interrogatories (R. 63) on this phase of the case were stricken (App. A, *infra*), it became impossible to reduce this inference to a certainty.

2. Conflicts with the Applicable Decisions of this Court.

Prior to the enactment of § 1404(a) in 1948, this Court described at some length the considerations relevant to motions to dismiss on the ground of *forum non conveniens*. *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 508-9

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[5] Decedent was also treated by certain physicians in New York City prior to his death. However, in the district court plaintiff conceded that their convenience could weigh neither in favor of nor against transfer. (R. 36.)

(1947).[6] Although the Court's opinion was careful to note that plaintiff's choice of forum should not be disturbed unless the balance of convenience was "strongly in favor of the defendant" (*Id.* at 508), it was the feeling of the majority that the balance of convenience was so heavily weighted that the case was one of the "rare" few in which dismissal was required, and the court therefore sustained the lower court's ruling to that effect, despite the fact that there were expert engineering witnesses residing in the Southern District of New York, in which the suit was brought, who would be called to testify. See *Gilbert v. Gulf Oil Corp.*, 62 F. Supp. 291, 292 (S. D. N. Y., 1945), 153 F. (2d) 883, 885 (C. C. A. 2d, 1946).

Shortly after the decision in the *Gulf Oil* case, Congress enacted § 1404(a), which this Court has recently construed in *Norwood v. Kirkpatrick*, 349 U. S. 29 (1955). The court there held that the criteria described by Justice Jackson in the *Gulf Oil* case were still relevant to motions to transfer under the new statute; however, the court also held that Congress had intended not merely to codify the principles announced in *Gulf Oil* but to enlarge the discretion of the district courts in granting motions to transfer:

> "* * * we believe that Congress, by the term 'for the convenience of the parties and witnesses, in the interest of justice' intended to permit courts to grant transfers upon a lesser showing of inconvenience

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[6] Those considerations, to the extent applicable to the present case, were as follows: (1) Relative ease of access to sources of proof; (2) availability of compulsory process for the attendance of unwilling, and the cost of obtaining the attendance of willing, witnesses; (3) avoidance of administrative difficulties resulting from piling up litigation in congested centers instead of handling at origin; (4) avoidance of imposition of jury duty upon communities having no relation to the litigation; and (5) local interest in having localized controversies decided at home.

[than under the doctrine of forum non conveniens]. This is not to say that the relevant factors have changed or that plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader." (*Id.* at 32.)

The facts of the present case are on all fours with those of *Gulf*, even to the presence in both of expert witnesses residing in the district where suit was filed. Petitioner made a clear and uncontradicted showing that each of the relevant factors listed in that case (*supra*, n. 6) required a transfer to the Northern District of West Virginia. The recent *Norwood* decision makes clear that transfer can and should be ordered under § 1404(a), even where dismissal under the *Gulf* case would have been improper. Although both of these controlling cases were cited to the courts below, transfer was denied.

3. Conflict with the Seventh Circuit.

The Seventh Circuit's recent decision in *Chicago, R. I. & P. R. Co. vs. Igoe*, 220 F. 2d 299 (C. A. 7th, 1955), cert. den. 350 U. S. 822 (1955), discussed *supra*, p. 13, reveals a further important and direct conflict with the present case. In that case, notwithstanding the plaintiff's residence in Chicago, where suit was filed, the Court concluded that the convenience of witnesses and the interest of justice were "so overwhelmingly in favor of defendant that denial of transfer amounted to an abuse of discretion." (*Id.* at 305.) Accordingly, a writ of mandamus issued directing transfer of the cause to Iowa.

In the case at bar, it is undisputed that the parties plaintiff and all of the factual witnesses resided well within the subpoena range of the Northern District of West Virginia, and the *only* circumstance which was or could have been said to justify a trial at Cleveland was that some

unnamed physicians gave plaintiff some undescribed examination there shortly prior to his death. (See pp. 4, 6, *supra.*) The present case thus presents a much clearer and more convincing picture of hardship to Petitioner, and the balance of convenience preponderates in its favor even more overwhelmingly, than in the *Igoe* decision, which resulted in inconvenience to one of the parties, rather than to a mere witness. The refusal of the court below to compel transfer through writ of mandamus is thus plainly in conflict with the decision of the Seventh Circuit, as well as with a host of decisions of the lower federal courts in factually similar cases.

C. IT IS ESSENTIAL THAT THE CONFLICTS BETWEEN THE COURTS OF APPEALS BE RESOLVED.

The foregoing discussion, revealing as it does wide areas of disagreement between the various Circuits as to the extent and nature of mandamus jurisdiction in transfer cases, serves of itself to indicate the imperative need of a decision from this Court setting at rest the several questions giving rise to conflict. The situation has become such that one eminent District Judge has recently observed that questions as to the availability and scope of appellate review of § 1404(a) orders are "ripe for decision by the Supreme Court." Irving I. Kaufman, *Observations on Transfer, Section 1404(a)*, 56 Col. L. Rev. 2, 11 (1956).

The quandary in which federal court litigants find themselves upon the present state of law can be no more vividly illustrated than by the situation presently prevailing in the district court from which this case comes. Two other petitions for certiorari originating there are presently pending, both "companion" to the present action. In *Fannin v. Jones, Chief Judge*, 229 F. (2) 368 (C. A.

6th, 1956), petition for certiorari filed April 6, 1956 (in which Petitioner is directly involved as defendant in the District Court), and *Berkihiser v. Jones, Chief Judge*, C. A. 6th (opinion unreported), petition for certiorari filed April 6, 1956, review is sought of two orders in which Chief Judge Jones of the Northern District of Ohio granted transfer of Federal Employers' Liability Act cases. It is the belief of Petitioner that both cases were properly decided, and the Sixth Circuit Court of Appeals so held. However, the balance of convenience in these cases was much less heavily weighted in favor of transfer than in the present action, and the affirmance by the Court of Appeals was predicated upon the enlarged discretion of the district courts under the *Norwood* case. It is therefore clear that, had Petitioner's motion to transfer in the instant case been decided by Judge Jones, transfer would have been ordered. Conversely, had the motions in the *Fannin* and *Berkihiser* cases been submitted to Judge Connell, respondent herein, transfer would presumably have been denied. While it may not be unusual for two judges to entertain different views on the same set of facts, it is extraordinary that counsel for the parties in these cases should regard the decisions of both judges as so clearly erroneous that they have sought review both by way of mandamus in the Court of Appeals and by way of certiorari in this Court.

Petitioner's experience in the present action and in the *Fannin* case, where disagreement among individual judges has produced such inconsistent results, finds an equally perplexing parallel in the experience of litigants generally. Where, as in the present case, a ruling on a motion to transfer appears to be contrary to the trend of prevailing decision, the right of the party aggrieved to appel-

late review can be determined only by analyzing the maze of conflicting appellate opinion hereinabove discussed. The results of such analysis are anything but trustworthy, particularly in those circuits which have not passed upon the question.

It is already clear that the basic purpose of § 1404(a) is to make litigation easy, expeditious, and inexpensive. But this cannot be brought about, as some courts insist, by denying to the complaining party any right of review of transfer orders;[7] yet the unanimous view that transfer orders are not reviewable on appeal (see n. 2, *supra*) means that the right to transfer must either be reviewed by mandamus or left entirely in the hands of the district courts. If the present case is any indication, the latter alternative risks an implied repeal of the transfer statute.

The answer to the problem is thus not to place restrictions upon the scope of mandamus in this case and others like it, but a definitive decision from this Court making plain that, despite the discretionary nature of the determination, there *are* certain areas in which the district courts *must* exercise their discretion in favor of or against transfer. The judicial history of § 1404(a) makes clear that the legislative purpose of the statute can be accomplished in no other way. Petitioner therefore earnestly asks this Court to grant its petition for certiorari, thus permitting a full hearing on the merits.

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[7] Clearly, it was *not* the intent of Congress to establish a procedure so valueless that it can be enforced only in million dollar cases (see, *e.g.*, *Ford Motor Co. v. Ryan*, 182 F. (2d) 329 (C. A. 2d), cert. den. 340 U. S. 851 (1950)), or in cases which can be said to be "extraordinary" in some other way.

CONCLUSION.

Since it is of vital importance to the administration of justice in the district courts and the courts of appeals that the matters herein presented be set at rest, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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KENNETH H. EKIN,
DWIGHT B. BUSS,
ALEXANDER H. HADDEN,
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APPENDIX A.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed February 13, 1956.)

Before MARTIN, McALLISTER AND STEWART, *Circuit Judges.*

The petition for a writ of mandamus is denied.

ORDER OF THE DISTRICT COURT ENTERED JUNE 3, 1955.

Upon consideration, it is ordered that defendant's motion to transfer this case to the United States District Court for the Northern District of West Virginia is hereby overruled.

/s/ JAMES C. CONNELL,
United States District Judge.

ORDER OF THE DISTRICT COURT ENTERED DECEMBER 22, 1955.

Upon consideration, it is ordered that defendant's petition for a rehearing on motion to transfer is hereby denied.

Further, it is ordered that plaintiff's motion to strike defendant's Interrogatories is hereby granted.

/s/ JAMES C. CONNELL,
United States District Judge.

JUN 1 195
HAROLD B. WILLEY,

In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. 931.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
A Maryland Corporation,
Petitioner,

vs.

HON. JAMES C. CONNELL,
Judge of the United States District Court for the Northern District of Ohio, Eastern Division.
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals for the Sixth Circuit.

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THE BALTIMORE AND OHIO RAILROAD COMPANY,
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vs.

HON. JAMES C. CONNELL,
Judge of the United States District Court for the Northern District of Ohio, Eastern Division.
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Respondent, The Honorable James C. Connell, Judge of the United States District Court for the Northern District of Ohio, Eastern Division, files herein his brief in opposition to the petition for a writ of certiorari heretofore filed by petitioner in the above entitled cause.

The petition for certiorari in this case seeks review of the refusal of the Court of Appeals for the Sixth Circuit to compel respondent, by writ of mandamus, to vacate an order denying transfer of an action entitled: "*Maxine M. Jones, Administratrix v. The Baltimore and Ohio Railroad Company,*" from the District Court for the Northern District of Ohio, Eastern Division to the District Court for the Northern District of West Virginia.

QUESTIONS PRESENTED.

1. Whether the Supreme Court of the United States will issue a writ of certiorari to review a decision of the Court of Appeals in a case wherein the Court of Appeals ruled *in favor of* the petitioner who seeks said writ.

2. Whether the Supreme Court of the United States will issue a writ of certiorari to review a decision of the Court of Appeals wherein the Court of Appeals has ruled that the District Court did not commit an abuse of discretion and wherein there is ample evidence supporting said discretionary ruling.

STATUTES INVOLVED.

Title 28, U. S. C. A. § 1404(a) is involved in this case and reads as follows:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Petitioner contends that Title 28 U. S. C. A. § 1651(a) is also involved. However, no case or controversy involving said statute is raised in this action as will be shown in the brief below.

STATEMENT OF THE CASE.

An action against The Baltimore and Ohio Railroad Company, petitioner, herein, was brought by Guy S. Jones in the United States District Court for the Northern District of Ohio, Eastern Division for personal injuries. This case, filed on April 5, 1955, was brought under the Federal Employers' Liability Act, 45 U. S. C. A. §§ 51-60. Petitioner thereupon filed its motion to transfer the case under 28 U. S. C. A. 1404(a) to the Northern District of

West Virginia. Petitioner's motion was based on the allegation that most of the fact witnesses were in West Virginia. The opposition to transfer was based in large part on the fact that the crucial issue in the case is causation—i.e., proving that the injury caused plaintiff's resulting cancer. Plaintiff stated that the important medical witnesses needed to prove his case are located in Cleveland and that they studied his condition in Cleveland with the facilities available in Cleveland. In addition, Cleveland is plaintiff's choice of forum. After oral argument and the submission of two briefs by petitioner and one by plaintiff, the District Court denied the motion to transfer. Three days after this ruling plaintiff died of cancer. Thereafter petitioner filed a motion for rehearing, supported by a brief. The District Court denied this motion for a rehearing.

Petitioner then filed in the United States Court of Appeals for the Sixth Circuit an Application for Leave to File a Petition for Writ of Mandamus together with a Petition for Writ of Mandamus and Brief. The Court of Appeals assumed jurisdiction and denied the Petition for Writ of Mandamus on the merits.

Petitioner then filed its Petition for a Writ of Certiorari which is now before this Court.

REASONS FOR DENYING THE WRIT.

1. The Supreme Court of the United States Will Not Grant a Petition for a Writ of Certiorari in a Case Wherein the Petitioner Seeks the Review of a Ruling *In His Favor.*

Petitioner seeks to dignify its request for a writ of certiorari by claiming that there is involved herein a conflict among the circuits concerning the power to hear a mandamus action which must be resolved by the Su-

preme Court. As will be shown below, even if the alleged conflict does exist, it is not involved in any disputed issue in this case.

It is accurately stated on page 7 of the Petition for a Writ of Certiorari that the Court of Appeals assumed jurisdiction and decided the Baltimore and Ohio Railroad's petition for mandamus on the merits.

Now, in violation of one of the most fundamental concepts of American jurisprudence, the Railroad asks for a writ of certiorari to review a question already decided in its favor. The Court of Appeals assumed full jurisdiction of the mandamus action as the Railroad would have it do. Now, it is the Railroad's contention before the Supreme Court that, although the Court of Appeals in this case ruled in its favor on this point, some other Court of Appeals might not have done so; therefore, a petition for writ of certiorari should be granted.

Article III, Section 2 of the Constitution of the United States extends the judicial power of the Federal Government to "cases" and "controversies" only. In the matter at bar, there is neither a "case" nor a "controversy" involving the question of whether or not there was jurisdiction to hear the mandamus action. Petitioner claims that there is jurisdiction to hear a petition for mandamus herein; respondent has not contested this position, and the Court of Appeals assumed jurisdiction as petitioner requested. Therefore, there exists no case or controversy to be taken to the Supreme Court.

From the earliest days of Supreme Court jurisprudence, the Court has held that it will not pass on a case in which there is no real controversy and in which the complaining party fails to demonstrate that he has suffered injury by the operation of the law. As early as 1793 when Secretary of State Thomas Jefferson submitted ques-

tions for the Supreme Court to answer, the principle was enunciated that the Court will not act on a non-justiciable case.[1]

In *St. Pierre v. United States,* 319 U. S. 41, 63 Sup. Ct. 910 (1943), the Supreme Court made it clear that it was without power to render advisory opinions. This firmly established principle that the Court will not hear a matter until it has ripened into a real controversy, has been stated by this Court on numerous occasions. See *United Public Workers of America (C. I. O.) v. Mitchell,* 330 U. S. 75, 67 Sup. Ct. 556 (1947). Even in a declaratory judgment action, the Court requires that there be a real controversy before it will hear a case. *Coffman v. Breeze Corporations,* 323 U. S. 316, 65 Sup. Ct. 298 (1945); *Asbury Hospital v. Cass County,* 326 U. S. 207, 66 Sup. Ct. 61 (1945).

It is to be noted that no decision of this Court on this question of whether or not there is jurisdiction to entertain a mandamus action in this matter can affect the rights of parties herein. If this Court should rule that mandamus jurisdiction does exist, then the effect of the ruling is to let the District Court decision stand. If this Court rules that mandamus jurisdiction does not exist herein, the result still will be that the District Court ruling stands. We have here a purely moot question.

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[1] *The Supreme Court in United States History,* Charles Warren, Vol. 1, pp. 108-112; *The Works of Thomas Jefferson (1904-1908)* edited by Paul Leicester Ford, Vol. VII, Letter of July 18, 1793.

2. The Supreme Court of the United States Will Not Review a Court of Appeals Refusal to Reverse a Discretionary Ruling of a District Court, Where There Is Ample Evidence to Support Said Ruling.

Petitioner completely ignores the fact that this Court in *Norwood v. Kirkpatrick*, 349 U. S. 29 (1955) clearly set forth the criteria to guide judges in ruling on requests for transfer under 28 U. S. C. A. 1404(a). Further, there is no indication that the District Court and the Court of Appeals ignored these criteria in the case at bar. This Court stated in the *Norwood* case at pages 31 and 32 that 28 U. S. C. A. 1404(a) permits the courts to transfer cases for the convenience of parties and witnesses, and in the interest of justice. The Court at page 32 made it clear that under U. S. C. A. 1404(a) the discretion of the Trial Court had been broadened:

> "This is not to say that the relevant factors have changed or that the plaintiff's choice of forum is not to be considered, *but only that the discretion to be exercised is broader.*" (Emphasis supplied.)

The Court further emphasized that if the statute is properly interpreted, and the facts warrant the result, it would not reexamine the case. The Court stated at pages 32 and 33:

> "Since we agree that the district judge correctly construed the statute in evaluating the evidence, we do not find it necessary to detail the facts considered by him in reaching his judgment. It was correct in law and warranted by the facts.
>
> "Since we find that the district judge properly construed section 1404(a), it is unnecessary to pass upon the question of whether mandamus or prohibition is a proper remedy."

In the case at bar, the *Norwood* decision was presented to the district court and the court of appeals in the briefs of the parties. Accordingly, it must be presumed that the trial judge and the court of appeals interpreted U. S. C. A. 1404(a) as they were required to do by the Supreme Court, for there is not an iota of evidence to the contrary. To hold otherwise, is to entertain an assumption that the trial judge and the court of appeals deliberately refused to follow the law as interpreted by the Supreme Court of the United States, without there being any basis for such an assumption.

That there is ample basis for the rulings of the district court and court of appeals was made clear by plaintiff in the original action in his brief in opposition to defendant's motion to transfer. In that brief plaintiff sharply demonstrated that he would suffer a serious hardship if the case were removed to West Virginia. It was noted that the crucial issue in this case is proving causation—i.e., the relationship between the injury and the resulting cancer. Plaintiff consulted with medical specialists in the Cleveland area on this highly complex medical problem, who had at their disposal the advanced medical technology to be found in a great metropolis such as Cleveland, and not available in small West Virginia towns.

Petitioner, in its frantic attempt to find some ground to gain entrance into the Supreme Court, claims on page 13 of its petition, that almost half of all the Federal Courts of Appeals[2] in the nation have decided as a matter of law to tolerate abuses of discretion by trial judges. Therefore,

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[2] *All States Freight v. Mcdarelli*, 196 F. (2) 1010 (C. A. 3rd, 1952), *Loew's Inc. v. McGuire*, 205 F. (2) 719 (C. A. D. C., 1953), *In re Josephson*, 218 F. (2) 174 (C. A. 1st, 1954), *Torres v. Walsh*, 221 F. 2d 319 (C. A. 2d, 1955), *Atlantic Coast Line R. Co. v. Davis*, 185 F. (2d) 766 (C. A. 5th, 1950).

claims petitioner, this Court should now grant its petition for a writ of certiorari to correct this position. Even if we should assume that petitioner's startling interpretation of the action of the Courts of Appeals were accurate, the correction of such appellate action cannot be made in the case at bar, for the issue is not involved in this case. This is true, first, because the Court of Appeals of the Sixth Circuit, which is involved in this case, has recently and clearly indicated that it will not tolerate abuses of discretion by District Courts. In *Fannin v. Jones,* 229 F. 2d 368 (C. A. 6, 1956), the Court refused to issue a writ of mandamus because, "The limits of that (the District Court's) discretion were not exceeded here." Clearly the Court indicated that it was concerned with the limits of discretion.

It should also be noted that half of the Federal Courts of Appeals in the nation have not gone over the deep end, as petitioner suggests. Petitioner overlooks the fundamental legal principle that a mere disagreement with a lower Court's discretionary ruling does not require reversal and does not indicate that the lower Court has abused its discretion. This position was succinctly stated by Chief Judge Calvert Magruder of the Court of Appeals for the 1st Circuit in *In re Josephson,* 218 F. 2d 174 (C. A. 1st 1954):

> "Petitions under section 1651(a) are addressed to our discretion. We do not think that the predominant consideration governing our decision whether to issue the extraordinary writ of mandamus should be that at all costs we must prevent the transfer out of the circuit of every single case that ought to remain here subject to our potential appellate jurisdiction. No doubt upon occasion a district court within this circuit may make an error of judgment in transferring a case to a district court outside the circuit. So, too, a district court outside our circuit may on occasion

make a similar error of judgment in transferring a case to a district court within this circuit. We do not anticipate that, on balance, our potential appellate jurisdiction will suffer any significant impairment. On the other hand, section 1404(a) provided an administrative facility that was supposed to contribute to convenience and expedition in the disposition of cases. This policy would certainly be defeated if the courts of appeals in the transferor districts should make it a routine practice to hold up the trial of a case pending review on mandamus of the question where the case ought to be tried."

We commend this entire opinion to the Court's attention. Judge Magruder's recognition that mandamus is an extraordinary remedy reserved for extraordinary situations is in conformity with the rulings of this Court. For example, in *Ex Parte Fahey,* 332 U. S. 258, 260, in referring to the use of mandamus, the Court stated:

"As extraordinary remedies, they (mandamus, prohibition and injunction) are reserved for really extraordinary causes."

CONCLUSION.

Respondent, in the case at bar, guided by 28 U. S. C. A. 1404(a) and by this Court's interpretation of said statute in *Norwood v. Kirkpatrick, supra,* and guided further by the facts and argument presented by the parties exercised his discretion to refuse to transfer a cause of action to another district. The Court of Appeals for the Sixth Circuit ruled that there was no abuse of discretion on the part of the Trial Court, and there is now no basis for a granting of certiorari to review the decision of the Court of Appeals.

In attempting to push its case before the Supreme Court, petitioner claimed, first, that there was a conflict in

the circuits as to whether or not there is power to entertain mandamus actions in these cases. This argument was shown to be without merit, for there is no controversy on this point in the case at bar. It was further shown that any ruling on this point cannot affect the rights of the parties herein.

Petitioner's second argument was that some circuits have erroneously denied review of abuses of discretion and some have granted review. Here again, we have a moot question, for we concede that abuses of discretion are reviewable and the Sixth Circuit in this case and more clearly in *Fannin v. Jones, supra,* has indicated that its policy is to review abuses of discretion.

There does not arise out of this case any issue or controversy involving a conflict in the circuits. Petitioner, respondent and the Court of Appeals for the Sixth Circuit all agree that the Court of Appeals may correct abuses of discretion.

The only controversy in this case arises out of the fact that petitioner believes it should have won a discretionary ruling which it lost. The Supreme Court has always required stronger reasons than that before issuing a writ of certiorari.

For the reasons stated herein, respondent submits that the petition for certiorari should be denied.

Respectfully submitted,

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